1955

Ella H. Beezley v. William L. Beezley : Brief of Appellant

Utah Supreme Court

W. R. Hutchinson, Jr.; Attorney for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

ELLA H. BEEZLEY,
Plaintiff,

vs.

WILLIAM L. BEEZLEY,
Defendant,

vs.

ELIAS HANSEN,
Third Part Defendant

Case No. 8411

BRIEF OF APPELLANT

W. R. HUTCHINSON, JR.
Attorney for Appellant

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STATEMENT OF FACTS

This suit was instituted by plaintiff against the defendant based upon the ground of cruelty, and for the purpose of having certain real property decreed in her, on the 8th day of May, 1952. That there has been no children born as issue of said marriage. That plaintiff and defendant were married at Salt Lake City, Utah on the 12th day of June,

1932. That defendant answered and filed a counterclaim claiming an undivided one half interest in the property claimed by plaintiff under a partnership agreement between the parties hereto. That during the month of August, 1952 said parties entered into an agreement of reconciliation, wherein the defendant agreed to give up in its entirety the use of intoxicating liquors, and based upon said promise the parties resumed there former status of husband and wife and cohabited together at the El Dumpo four plex, 171 East 9th South and 150 South 7th East known as El Vego apartments, Salt Lake City. That said relationship continued on up and until the 17th day of July, 1953, at which time the plaintiff terminated said renewed relationship without any provocation whatsoever upon the part of this defendant. That at all times the defendant kept and performed his part of said agreement, and that a complete condonation was in effect at the time plaintiff arbitrarily terminated same.

The plaintiff and defendant purchased the Harrison Avenue home on or about the 8th day of September, 1932 and the only amount paid thereon by plaintiff was the sum of $125.00, and the defendant made all other payments that were made thereon. Said property was held jointly by the parties. That thereafter on or about April 1st, 1936 the plaintiff and defendant entered into an oral partnership agreement wherein it was agreed that they would

become joint partners and lend their efforts in acquiring income bearing property located in Salt Lake City, Utah, and to deal generally in such property and share equally in such property and profits as joint partners. That thereafter on or about April 20th, 1936 defendant turned over to the plaintiff three lots that he owned in Lambs canyon which in turn were used in the purchase of a house on 9th avenue. Defendant renovated and improved the property which thereafter was sold at a profit after renting the same. That the title was held jointly by the parties.

That the plaintiff and defendant examined investment property known as the Monteray Apartments located at 148 East 7th South, Salt Lake City, for the purpose of determining whether the property would be a good investment; thereafter on or about the 27th day of November, 1937 the property was purchased by plaintiff, based upon the following considerations: That on the 20th day of November, 1937 Elias Hansen mortgaged his home to Tracy Loan and Trust Company for $4,000.00 adding thereto $800.00, together with $200.00 applied by plaintiff making down payment of $5000.00 thereafter plaintiff and defendant signed a mortgage for the sum of $3000.00 and assumed a mortgage in the sum of $4500.00 on the 24th day of November, 1937, which was essential or the purchase would not have been closed. Said apartments were purchased for $12,-

500.00. That thereafter plaintiff and the defendant signed and executed note and mortgage in favor of Tracy-Collins Trust Company on the 22nd day of March, 1938, which money so borrowed was used to pay off the mortgages of $3000.00 and $4500.00 hereinabove set forth. That the income from the operations of Monteray Apartments was applied upon the mortgages signed by the defendant, together with home mortgage executed by Elias Hansen and wife. That on April 26th, 1938 plaintiff executed a deed in favor of Elias Hansen and wife to an undivided one-half interest in the Monteray Apartments. That plaintiff executed a note and mortgage on Monteray Apartments in favor of Elias Hansen in the sum of $9500.00 on the first day of April, 1943 which was later paid off. That the defendant furnished three automobiles, Ford, Hudson and Dodge, which plaintiff used in the operations of the Monteray and El Vego Apartments. That the Harrison Avenue property came under the partnership agreement when formed. That at the time of the purchase of the Monteray Apartments plaintiff and defendant agreed to keep such arrangement a secret, due to the ill feelings existing between the defendant and Elias Hansen and wife. During the operation of the Monteray Apartments Elias Hansen over a period of eight years visited plaintiff and defendant at their apartment based on his evidence as follows:

A. "Oh, yes. I think Mr. Beezley did some

of that, taking the garbage out, although I never went down there. I don't think I was in that apartment half a dozen times." see defendants Ex. 31-P. 19.

That the plaintiff and defendant lent their services in the operations of both apartment buildings on up and until this action was instituted at which time the plaintiff repudiated and breached the agreement between the plaintiff and defendant. That plaintiff acknowledged the rights of defendant as set forth in the counterclaim on file herein, by virtue of D. Exs. 5 and 6.

That on or about July 1st, 1940 defendant caused to be organized, while operating the Monteray Apartments, what was known as "Central Civic and Beautification League of Salt Lake City, Utah." That said League operated in a radias of twenty blocks in and around the Monteray Apartments for the express purpose of beautifying and improving the particular locale. That the defendant devoted a great deal of his time and attention to the League over a period of approximately five years with good results.

That on July 5th, 1945 the Monteray Apartments were sold for the sum of $27,000.00, at which time Elias Hanson was paid off in full and the accounts between Elias Hansen and plaintiff respecting the operations were balanced. That on July

12th, 1945 Elias Hansen and wife purchased the El Vego Apartments subject to a mortgage of $45,000.00; purchase price $65,000.00 with a down payment of $19,500.00 half of which was plaintiff's interest in the sales price derived from sale of the Monteray Apartments, leaving balance of $45,000.00. That on the 14th day of July, 1945 Elias Hansen and wife deeded an undivided one half interest in the El Vego Apartments to the plaintiff. That at the time of sale of Monteray Apartments the furniture and furnishings owned and held by plaintiff and defendant went in on the sale of the property for the sum of $500.00 and a bill of sale given to the purchaser therefore.

That during the operations of both apartments the plaintiff and defendant had a joint account for goods, wares and merchandise with Sears-Roebuck & Company at Salt Lake City, where both parties charged for merchandise to be used in the Monteray and El Vego Apartments. That the deed given to purchaser of Monteray Apartments when sold was executed by plaintiff, Defendant, Elias Hansen and wife. That in 1946 plaintiff and defendant sold the Harrison property and purchased what is known as El Dumpo a four plex apartment and they held same jointly which is of the value of approximately $15,-000.00.

That said property is free and clear of encumbrances.

STATEMENT OF POINTS

1. The court erred in finding that the evidence in this cause was sufficient to show that the defendant, William L. Beezley, committed additional acts of cruelty, which in effect revived the original grounds for divorce as alleged by plaintiff. That William L. Beezley kept and performed the agreement of reconciliation in its entirety. That his conduct complained of in no manner constituted cruelty.

2. That the court erred in the trial of this cause in which he failed to impress equity and title to the property involved herein in the defendant, William L. Beezley, under and by virtue of a partnership agreement existing between them. That the evidence and testimony as disclosed by the record herein amply proved by a preponderance thereof that such partnership agreement existed between plaintiff and defendant with part performance thereunder by both parties concerned therewith.

3. That the court erred in decreeing unto defendant an undivided one half interest belonging to plaintiff in and to what is known as El Dumpo situated at 171 East 9th South, Salt Lake City, Utah. That no findings were made to support said delivery of title to defendant, and that said

title thereto was not in issue as framed by the pleadings and no relief asked for by either party to this action.

ARGUMENT

Point 1. At the outset we refer to the pleadings of the parties to this action, which frame the issues involved, to-wit; Complaint of plaintiff, the Amended Answer and Counterclaim of the defendant, the Third Party Complaint of the defendant, the Answer of the Third Party Defendant, the Amended Reply to the Amended Answer and Counterclaim of the defendant, the plaintiff's Supplemental Complaint, and defendant's answer to plaintiff's Amended Reply, J. R. 1-2; 40-42; 62; 31-36; 43-44; 21-23; 58-60; 74-76.

As to the above Point two issues arise (1) did the parties agree to resume there marital relations subsequent to divorce action (2) thereafter did the defendant commit additional acts of misconduct that would constitute cruelty under the record. As to the first point there is no dispute as to a reconciliation and the resumption of co-habitation up to and including July 17, 1953 at which time plaintiff arbitrarily cancelled the arrangement.

The court found no facts in this connection and set forth nothing but conclusions of law. J. R. 86-90.

The plaintiff testified that defendant was always claiming an interest in the property during their married life; so, making his demand again would raise nothing new which would constitute cruelty. Plaintiff testified that defendant desired Elias Hansen to move out of El Vego. Taking her evidence for what is is worth, the record clearly shows ill feelings between the defendant and Elias Hansen, and such statement, if made, would not be grounds for repudiation of the reconciliation, and plaintiff made no effort to work out other arrangements, but instead cancelled arbitrarily. See deposition of plaintiff P. 35 "She would dismiss the case and start all over, if we could agree on her terms." P. 53.

Q. Why did you require a deed from El Vego from him?

A. Because he was always claiming that he did have an interest. D. Ex. 30, P. 53.

If anyone has committed cruelty in this matter it is the plaintiff towards defendant. See Trans. P. 101-2-3; D. Ex. 3 Letter. Jeanne Barton. Trans. P. 155-6. P. 158 to 160. Wm. L. Beezley.

Douglas vs. Douglas 99 P. (2nd) 479 (Oregon 1940)

> The "cruelty" constituting a ground for divorce must be unmerited and unprovoked unless it is unjustified by the provocation and

out of proportion to the offense, and subject to that rule, where both parties contribute by misconduct to marital discord, neither is entitled to a divorce.

Heisler vs. Heisler 55 P. (2nd) 727 (Oregon) (1936)

Generally, both parties being at fault, neither is entitled to divorce.

Walker vs. Walker 276 P. 300 (Wash.) held.

Setting aside final decree of divorce held not abuse of discretion where parties sporadically cohabitated after entry of interlocutory order. The remarriage to third party does not deprive superior court of jurisdiction to vacate final decree of divorce. The plaintiff had remarried after the decree became final.

McKee vs. McKee 151 Atl. 620, (N.J. Equity).

Miller vs. Miller, 3 P. (2nd) 1069 (Nevada), rehearing granted 6 P. (2nd) 1117, affirmed 11P. (2nd) 1088.

Where injured spouse cohabits with offending spouse with knowledge of his misconduct, cohabitation condones misconduct.

Where spouse intentionally brings cohabitation to an end by misconduct which renders continuance of marital relations so unbearable that other leaves home, former and not latter is deserter. One spouse is not justi-

fied in leaving other unless conduct of offending spouse is such as would constitute grounds for divorce.

See Lassen vs. Lassen, 7 P. (2nd) 120 (Kansas)

Davis vs. Davis, 68 S. E. 594 (Ga.)

Condonation is not revocable at will and, accordingly, unless forfeited by subsequent misconduct, operates as a complete bar to any suit for divorce based on the offense condoned.

Ann. Cas. 1912 C, Am. Jur. Sec. 207, Page 254.

To constitute condonation there must be something of matrimonial intercourse. Defendant is of the opinion that his examination of plaintiff was legally within his bounds, and could not constitute cruelty.

Plaintiff claims that her examination of intercourse constituted cruelty.

See P. Ex. 1 which is a letter signed by plaintiff and defendant, under date of September 5th, 1952 agreeing to divorce under certain conditions, the subject matter of which was submitted to plaintiff's counsel before same was signed and executed. Regarding said exhibit defendant cites the following case.

Grush vs. Grush, 3 P. (2nd) 402 (Montana)

Wife's agreement not to defend divorce action in consideration for agreement that husband's promise to pay alimony should be incorporated in decree, is opposed to public policy. Note 78-13 C. J. 463-4.

Point 2. This point involves the question of a partnership agreement wherein the plaintiff is charged with holding one half of her interest she now holds in the El Vego Apartments, together with the furniture and equipment contained therein in trust for the defendant. We desire to call your attention, first, to the documentary evidence in the record, which we contend supports said partnership agreement, and defendant's title thereto.

D. Ex. 5 written by plaintiff to Tip, a sister of the defendant and among other things stated; "If Dad hadn't helped Bill and I out in purchasing this Apt. so we could earn a home etc. it would have been difficult financially and I ain't kidding because we are always one step ahead of the wolf." This statement is an absolute admission of the stand defendant takes in this matter. Dated August 21, 1951.

D. Ex. 6. Deposition in case of Wm. L. Beezley and Ella H. Beezley vs. Robert E. Buhler and Verl Ray Summers, taken August 31st, 1951, wherein plaintiff testified as follows:

Q. Will you state your name please?
A. Ella H. Beezley.

Q. Where do you live Mrs. Beezley?

A. 150 South 7th East, Apartment 7.

Q. Is that an Apartment House?

A. That is.

Q. How many apartments?

A. We have twenty-four units there.

Q. Are you the owner of the place?

A. We are the owners, and operator or manager. We have a caretaker.

Q. You mean you and your husband?

A. Yes.

The above evidence was given under oath and plaintiff recognized the rights of defendant under their agreement. See Trans. P. 115-16 also see plaintiff's deposition P. 95-6.

As to purchase of Monteray Apartments see D. Ex. 17 which is a mortgage in the sum of $3000.00 signed by plaintiff and defendant. D. Ex. 20 which is the mortgage in the sum of $4500.00 assumed by the plaintiff and defendant. D. Ex. 18 warranty deed to Plaintiff covering Monteray Apartments under date of 24th day of November, 1937. D. Ex. 21 Mortgage in sum of $7000.00 dated 22nd day of

March, 1938, which money was used to pay off balance of the two mortgages hereinabove set forth. D. Ex. 8 reciting payments made on the mortgage executed by Elias Hansen. D. Ex. 9 reciting payments made on D. Ex. 21 above set forth. The moneys paid, evidenced by D. Exs. 8 and 9, came from the revenue derived from Monteray Apartments. D. Ex. 10 Quit-Claim Deed under date of April 26, 1938 from plaintiff to Elias Hansen and wife for an undivided one-half interest in the Monteray Apartments. D. Ex. 11 Mortgage executed by plaintiff to Elias Hansen for $9500.00 dated the 1st day of April, 1943. D. Ex. 24 Letter Head used by defendant in operations of Central Civic and Beautification League of Salt Lake City. D. Ex. 4 Bill of Sale to Hudson Automobile from C. B. Dahl to defendant. D. Ex. 13 Deed to Monteray Apartments signed by Elias Hansen and wife and Ella H. Beezley and her husband William L. Beezley to John W. Springer the purchaser. Dated the 5th day of July, 1945. D. Ex. 15. Deed of Trustee covering El Vego Apartments running in favor of Elias Hansen and wife. Dated the 12 day of July, 1945. D. Ex. 16. Warranty Deed for an undivided one-half interest in the El Vego Apartments; Elias Hansen and wife grantors and Ella H. Beezley Grantee. Dated the 14th day of July, 1945. D. Ex. 27 pertaining to purchase, mortgages, and sale of the Harrison Avenue property, including records of payments made thereon by defendant. D. Ex. 26. 9th Avenue property

which contains contract of purchase; payment book mortgage; deed to plaintiff and defendant; deed to purchaser from plaintiff and defendant. D. Ex. 28. Contains Assignment of contract of purchase to plaintiff and defendant, together with real estate contract and receipt for earnest money.

We have called your attention to the foregoing exhibits which show a continuous chain of circumstances, both direct and indirect, surrounding the entire dealings between the plaintiff and defendant, which in our opinion shows that the partnership agreement was in existance at the time plaintiff instituted this action, based upon admissions, documentary evidence and oral evidence.

Regarding to payments made on Harrison Avenue property plaintiff made two definite statements that are contradictory; (1) she made the payments to seller, Mr. Durtschi, and failed to obtain receipts, D. Ex. 30 P. 73, (2) that she made the payments to defendant, Trans. 39-41. Defendant testified he made all the payments with exception of $125.00. Trans. P. 124-31. Joint account with Sears-Roebuck Co. for purchase of equipment for both apartments. Trans. 116-18. Defendant was always claiming an interest in the property, P. 53 D. Ex. 30. Plaintiff would dismiss action if parties could agree upon her terms, and start all over. D. Ex. 30, P. 35; Trans. P. 60. As to partnership agreement the plaintiff testified as follows:

Q. Wherein the two of you would go, in effect, in partnership and acquire revenue earning property?

A. Oh, I told him to do that. I told him to sell Harrison Avenue and get income property.

Q. You made an agreement to go in fifty-fifty on income returning property, didn't you?

A. Yes, we did it from time to time. D. Ex. 30, P. 72.

Lots in Lambs Canyon turned over to plaintiff for investment. Trans. 42-3. As to partnership between the parties plaintiff testified as follows:

Q. Just one question: At least as far as your evidence is concerned, you had a partnership agreement with Bill, didn't you?

A. That he should get these other properties, we should pool our income and try to find security. Trans. P. 207.

Elias Hansen stated that Tracey Loan and Trust Co. and Mr. Springer wanted the deed to Monteray Apartments signed by Mr. Beezley by virtue of homestead act, when the record shows that Tracey Loan and Trust had been paid off some three years prior thereto. D. Ex. 31, P. 12. Paid off see Ds. Exs. 8, 9 and 21. Record shows Elias Hansen borrowed

$4000.00 on home four days prior to the defendant assuming $7,500.00 by way of mortgage which raises the presumption that defendant would sign the mortgage. Ds. Exs. 8 and 17.

As to Homestead we cite the following:

> Title 28, Chapter I, Vol. 3, 1953 Utah Code Annotated, Section 28-1-6: If the Homestead claimant is married, the homestead may be selected from the separate property of the husband or with the consent of the wife from her separate property.
>
> See Williams vs. Peterson, 86 Utah 526, 56 Pac. (2nd) 674.

That the answer of Elias Hansen in this cause alleges in paragraph 4 thereof as follows:

> "That the balance of the purchase price was paid by notes secured by mortgages on the above mentioned Monteray Apartments. That one of such notes was made payable to the Tracey Loan & Trust Company and secured by a first mortgage on said Monteray Apartment house. That such note and mortgage was signed by the defendant, William L. Beezley and the plaintiff Ella H. Beezley." J. R. P. 49.

That the above admission shows that the defendant participated in the purchase price of the Monteray Apartments.

Elias Hansen claims, in effect, that defendant did not sign the second note and mortgage for $7000.00 and doesn't recall the transaction as between the first and second note and mortgage. Trans. P. 87 and 88. See D. Exs. 17 and 21.

Elias Hansen stated that plaintiff made the payments on Harrison property but admitted his statement was based upon what plaintiff told him, and did not know his own knowledge. D. Ex. 31, P. 46.

As to partnership agreement between plaintiff and defendant we call your attention to the evidence of the following witnesses for defendant:

Jeanne Theresa Barney-Trans. P. 97 to 107.

Vernon Edward Beezley-Trans. P. 209.

C. B. Dahl-108 to 114.

William L. Beezley-Trans. P. 120 to 177; 212 to 230.

Defendant cites the following cases in support of his contentions regarding the real property involved in this action:

In Re Barnes Estate, 108 N. E. (2d) 88:

> So far as statute of frauds is concerned, trusts, even in land, may be created without writing. It is not necessary that an intention to create a trust relationship be expressed, but an acceptance by conduct of the terms which propose that a trust relationship be set up is *sufficient*. Where husband dies leaving executed oral contract which is void under the statute of frauds so far as it relates to lands, equity will enforce the contract and the statute of frauds cannot be interposed by wife's devise. Proceedings in the matter of the estate of Hattie Barnes, deceased. Decedent and her husband had divided their property equally between themselves and made oral agreements to provide the property of first spouse to die would pass to surviving spouse, with full power to consume and that upon survivor's death, survivor's estate was to be equally divided between heirs of both husband and wife. The surviving wife obtained title to realty as surviving joint tenant and plan was thereby disrupted. The hubsand's heirs filed exceptions to inventory of the wife's estate. The Common Pleas Court, Porter J., held that a trust would be declared in the property in accordance with the agreement.

In Re Barnes Estate, 108 N. E. (2d) 88, Affirmed 108 N. E. (2d) 101:

> It is not necessary that an intention to

create a trust relationship be expressed but an acceptance by conduct of the terms which propose that a trust relationship be set up is sufficient. An express trust may be created even though the parties do not understand what a trust is and the question whether a trust has been so created is to be determined from all the circumstances surrounding the transaction.

Trustor's declarations prior to, contemporaneous with, or subsequent to transactions are admissable to show an express trust.

It is competent to show by parole evidence the conversations had by creator of trust with his attorney at the time of the creation of the trust instrument.

People v. Pierce, 243 P. (2d) 585, 100 C.A. (2d) 598:

In order to establish a trust, it is necessary to offer clear and convincing proof thereof, but such proof may be indirect consisting of acts, conduct and circumstances, and the question whether the showing is clear and convincing is primarily one for the trial court.

Ditto v. Piper, et al, 244 S. W. (2d) 547, CCA Fort Worth, Texas, Nov. 23, 1951:

Appellant on the death of his wife, the mother of appellee, was appointed and qualified as guardian of the estate of Elizabeth, his only child, then a minor. In 1918 during the

pendency of the guardianship, and while Elizabeth was about 16 years of age, appellant conveyed that realty in question which admittedly was his separate property to Elizabeth by warranty deed. It seems evident that this conveyance was made in anticipation of a judgment that might be rendered against appellant and subsequent judgment lien and execution. In 1924 Elizabeth, then a feme sole, and 22 years of age, conveyed the property back to her father by warranty deed. She testified in substance that her father told her that if she would execute this deed of conveyance, he would hold one half of the property in trust for her, and that when it was sold, or at his death, she would get one half interest. The appellant denied that any such promise was ever made by him. Appellant predicates his appeal on ten points, only four of which we shall discuss, the remainder pertaining largely to procedural matters which we consider of no merit. Appellant's point that the evidence is wholly insufficient to support the judgment is overruled. The testimony of the appellee, the substance of which is given above, is sufficient in our opinions to make an issue of fact for jury as to whether or not her father created the trust for her in this property. A trust may be engrafted on a deed by parole evidence. Faville v. Robinson, 111 Tex. 48, 227 S . W. 938, Binford v. Snyder, 144 Tex. 134, 189 S. W. ((2d) 471.

Dieter's Estate, 239 Pac. (2d) 954, 172 Kan. 359:

> An express trust may be created and must be deemed to be established by evidence, when

it is attacked by demurrer if evidence manifests an intention to create it, regardless of whether that manifestation be established by written or spoken words, or by conduct. In a suit to enforce trusts, plaintiff's evidence was sufficient as against a demurrer to establish that grantee had acquired title to real estate under conditions and circumstances obligating him to hold it in trust for grantees.

After case is submitted for final decision upon its merits, alleged trust must be shown by clear and satisfactory evidence, but evidence need not reach that high degree of definiteness and certainty when tested by demurrer and when so tested general principles applicable to ruling on demurrer control.

Gibson v. Gibson, (Court of Appeals of Kentucky, May 16, 1952) 249 S. W. (2d) 53:

Delay for more than 30 *years* in bringing suit for enforcement of oral trust in land did not preclude enforcement of trust where relation of trust had been acknowledged to exist between the parties by their actions and its continuance had been unbroken until date of suit.

Knox v. Long, (Tex. Civil Appeal) 251 S. W. (2d) 911:

In action to enforce alleged parole trust, evidence was sufficient to sustain award to plaintiff of one-half interest in oil and gas lease hold estate, certain personal property, and a residence, and a one-fourth interest in oil and gas royalty.

Ramsey v. Connor, (Okla.) 240 Pac. (2d) 1072:

> In ejectment action, evidence tending to show that defendant held legal title to land in trust for plaintiff was sufficient to take the case to the jury.

Anderson v. Cercone, 54 Utah 345, 180 Pac. 586:

> Where husband and wife live together in mutual confidence of marriage relation and husband purchased property, title thereto, being taken in the name of the wife, held possession of husband and wife was joint, and statute of limitations did not run to prevent husband from having property regarded as being held in trust for him. The relationship of parties implies that the trust is to be a continuing one until such time as it suits the husband's convenience to demand execution or until repudiated by wife and the statute of limitations does not commence to run until *such demand or repudiation.*

Wyse et al v. Puckner, 51 N. W. (2d) 38, 260 Wis. 365 (Jan. 8, 1952):

> A trust need not be declared in express terms, but proper written evidence, including letters in writings, disclosing facts which create fiduciary relationship is sufficient.

Barrett et al v. Vickers et al Trust, 100 Utah 534, 116 Pac. (2d) 772 (Dec. 10, 1941):

> Evidence was sufficiently clear, un-

equivocal and explicit to show that ranch which had been bought by plaintiffs from state under agreement with defendants and intervenors that each family was to have an undivided one-fourth interest and that plaintiffs and intervenors advanced down payment but later defendants tendered their shares established a trust in plaintiff for each family of an undivided one-fourth interest in the ranch. Corey v. Roberts, 82 Utah 445, 25 Pac. (2d) 940. Parole evidence is admissable to show a trust relationship by operation of law.

TAKEN OUT OF STATUTE OF FRAUDS

Bess v. McHenry, 89 Montana 520, 300 Pac. 199:

> Our court under these statutes in accordance with the great weight of authority has held that they have no application to oral contracts which have been fully executed. Wells v. Waddell, 50 Mont. 436, 196 Pac. 1000, 1001. In the case just cited it was held and we think correctly, that "the statute of frauds" was never intended to cloak fraud, but to prevent it. Its aim was to avoid the aspersion of claims which from their very nature should be evidenced only by an instrument in writing signed by the party to be charged or his agent thereunto duly authorized. But when a tenant has occupied the demised premises voluntary for the full term of the lease, he may not invoke the invalidity of the contract to shield him from payment of the rent. Webster v. Nichols, 104 Ill. 160; 2 Reed on Statute of Frauds, par. 639. Brown on Statute of Frauds

s. 116; Wood on Statute of Frauds s. 277; 25 R.C.L. 706.

While an oral contract which as an executory agreement is invalid by reason of the statute of frauds, when it has been completely executed in accordance with its terms, it is thus taken out from under the operation of the statute. Stillinger v. Kelly, 66 Mont. 441, P. 66, 68 Mont. 64, 216 P. 811, McIntyre v. Danes, 71 Mont. 367, 229 P. 864, Hogan v. Thrasher, 72 Mont. 318, 233 P. 607, Gravelin v. Parier, 77 Mont. 260, 250 P. 823, a fully executed parole contract cannot be affected by the statute of frauds, and cannot be assailed by the parties, or by third persons, on the ground that it is not in writing.

The rule is the same where full performance is by one of the parties only. 12 Cal. Jur. p. 927.

The part performance of an oral contract which will avoid the statute of frauds may consist of any act which puts the party performing in such a situation that non-performance by the other would be a fraud upon the person executing his part of the agreement according to its terms. Eccles v. Kendrick, 80 Mont. 120, 259 P. 609, Shaw v McNamara & Marlow, 85 Mont. 289, 278 P. 836, 27 CJ P. 343, 344.

Van Natta v. Heywood (Decided Dec. 30, 1920) 57 Utah 376, 195 P. 192, involves agreement to make will in consideration for services to be rendered. The contract between the de-

ceased and plaintiff although an oral one, was taken out of the statute of frauds by reason of part performance by the plaintiff. The court held "Nothing in this title contained shall be construed to abridge the power of courts to compel the specific performance of agreements in case of part performance thereof." Darke v. Smith, 14 Utah 35, 45 Pac. 1006; Lunch Covigila, 17 Utah 107, 53 Pac. 983; Karren v. Rainey, 30 Utah 7, 83 Pac. 333, Warren v. Warren, 105 Ill. 568.

Point 3. That the trial court erred in decreeing unto defendant an undivided one-half interest in and to the El Dumpo Apartments which at the time this action was instituted vested in plaintiff. That the title at no time was in issue and the defendant at no time sought said interest as held by plaintiff.

CONCLUSIONS

First. That the plaintiff is not entitled to a decree of divorce against the defendant by reason of condonation as plead and proved, and the trial judge should be directed to enter judgment in favor of defendant, no cause of action.

Second: That defendant is entitled to be decreed the real property together with equipment based upon his claim therefore, as supported by the record in this cause.

Third: That the court erred under the pleadings and record in this cause in decreeing plaintiff's interest in El Dumpo to defendant.

Respectfully submitted,

W. R. Hutchinson, Jr.
Attorney for Appellant